Teng Chang Khim (appealing as Selangor State Legislative Assembly) v Badrul Hisham bin Abdullah & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01–199 OF 2011 AND B-01–363 OF 2011
ABDUL WAHAB PATAIL, DAVID WONG AND VARGHESE GEORGE JJCA
3 DECEMBER 2014

Civil Procedure — Adjournment — Appeal against — Counsel engaged in another trial — Court fixed another hearing — No written request for adjournment made by counsel — Junior counsel appeared in court and requested for adjournment of hearing — Court refused adjournment — Whether judge correct in not allowing adjournment requested by junior counsel at hearing

The appellant had filed an application to set aside a judgment on the ground that the same was a judgment in default. The matter was originally fixed for hearing on 17 February 2011 for encl 1 (originating summons) and encl 8 (striking out application). The appellant's solicitors wrote to the court seeking an adjournment of the hearing on 17 February 2011 on the basis that the appellant's counsel ('Mr Tommy Thomas') was engaged in a trial in Johor Bahru. The case management of the originating summons was then fixed on 16 February 2011 for the purpose of fixing a hearing date. On that day, after consultation with all parties, the court fixed the matter for hearing on 18 February 2011. No written request for adjournment was made by counsel for the appellant on the 18 February 2011 nor did they inform the first respondent's solicitors that they intend to apply for an adjournment on 18 February 2011 on the ground that Mr Tommy Thomas would still be in Johor Bahru High Court. At the hearing on 18 February 2011 at 3pm, Mr Tommy Thomas's junior counsel appeared and requested for an adjournment of the hearing on the ground that Mr Tommy Thomas was still conducting a trial in Johor Bahru High Court. After seeking all the parties' views on this application, particularly with regard to the manner in which the hearing date had been fixed during case management on the 16 February 2011 in the presence of all parties, the judge refused to grant an adjournment and proceeded with the hearing of the matter. The junior counsel did not make any submissions and also did not provide the court with any outline submissions. Submissions by respective counsel for the first and second respondents were made and they also relied on their respective outline submissions. After hearing parties, the court on the same day dismissed the appellant's encl 8 and allowed the first respondent's encl 1 in part with costs of RM40,000. The appellant filed

the application in the High Court to set aside the purported 'default' judgment of 18 February 2011 which was dismissed with costs. The issue that arose was whether the judge was correct in not allowing an adjournment requested by junior counsel at the hearing of encl 1.

Held, dismissing the appeal:

(1) The crucial event to consider was what actually happened during case management on 16 February 2011 before the deputy registrar. It was common ground that Mr Tommy Thomas was not free on that date and could not be contacted. It was unlikely that Mr Ganesan had consented to the date unreservedly when in the first place he had informed that the date of 18 February 2011 was not suitable to Mr Tommy Thomas and had asked for another date. It was unfortunate that the deputy registrar had not recorded the minutes of the case management accurately and that was to reflect that Mr Tommy Thomas could not be contacted during that short adjournment and as such Mr Ganesan was not able to obtain any instruction from Mr Tommy Thomas (see paras 21 & 24).

(2) The hearing was heard without the benefit of full submission from Mr Tommy Thomas bearing in mind that it related to an interpretation of the Constitution of the Selangor in the context of the power of the Speaker of the Legislative Assembly in declaring a state seat vacant and the Federal Constitution. Needless to say it was very much a public interest matter. No prejudice to either party if that course of action was taken. The presence of junior counsel with respect did not legitimise the hearing. In fact from the commencement of the hearing the junior counsel had informed that she had no instruction to proceed with the hearing and not in any position to make any submission (see para 27).

(3) Ordinarily, the aforesaid conclusion would entail this court to set aside the orders of the court made on 18 February 2011 and to remit the matter for retrial on its merits. However, as the issues that arose in this matter was determined by the High Court by way of affidavits and on undisputed factual matrix, this court was entitled to proceed to consider the merits of the appeal. Appeals such as this are disposed by way of a rehearing of the arguments and accordingly there will not be any prejudice caused thereby to the parties (see para 28).

[Bahasa Malaysia summary

Perayu telah memfailkan permohonan untuk mengetepikan penghakiman atas alasan bahawa ianya adalah penghakiman ingkar. Perkara ditetapkan pada asalnya untuk pendengaran pada 17 Februari 2011 untuk lampiran 1 (saman pemula) dan lampiran 8 (permohonan membatalkan). Peguam perayu menulis kepada mahkamah memohon penangguhan pendengaran pada 17 Februari 2011 atas asas bahawa peguam perayu ('En Tommy Thomas') sedang

menghadiri dalam perbicaraan di Johor Bahru. Kes pengurusan saman pemula kemudiannya ditetapkan pada 16 Februari 2011 bagi tujuan menetapkan tarikh pendengaran. Pada hari tersebut, selepas perundingan dengan kesemua pihak, mahkamah menetapkan perkara tersebut untuk pendengaran pada 18 Februari 2011. Tiada permohonan bertulis dibuat oleh peguam untuk perayu pada 18 Februari 2011 tersebut atau mereka memberitahu peguam responden pertama bahawa mereka berniat untuk memohon untuk penangguhan pada 18 Februari 2011 atas alasan bahawa En Tommy Thomas akan masih berada di Mahkamah Tinggi Johor Bahru. Pada masa pendengaran pada 18 Februari 2011 pada pukul 3 petang, peguam pembantu En Tommy Thomas menghadiri dan memohon untuk penangguhan pendengaran atas alasan bahawa En Tommy Thomas masih menjalankan perbicaraan di Mahkamah Tinggi Johor Bahru. Selepas memohon pandangan kesemua pihak atas permohonan ini, terutamanya berkaitan kepada cara di mana tarikh pendengaran telah ditetapkan semasa kes pengurusan pada 16 Februari 2011 tersebut dalam kehadiran kesemua pihak, hakim enggan untuk memberikan penangguhan dan meneruskan dengan mendengar perkara tersebut. Peguam tersebut tidak membuat apa-apa penghujahan dan juga tidak memberikan kepada mahkamah dengan apa-apa garis rangka penghujahan. Penghujahan oleh peguam masing-masing untuk responden pertama dan kedua dibuat dan mereka juga bergantung ke atas garis rangka penghujahan mereka masing-masing. Selepas mendengar pihak-pihak, mahkamah pada hari yang sama menolak lampiran 8 perayu dan membenarkan sebahagian lampiran 1 responden pertama dengan kos sebanyak RM40,000. Perayu memfailkan permohonan di Mahkamah Tinggi untuk mengetepikan penghakiman 'default' 18 Februari 2011 yang ditolak dengan kos. Isu yang berbangkit adalah sama ada hakim adalah betul dalam tidak membenarkan penangguhan yang dipohon oleh peguam semasa pendengaran lampiran 1.

Diputuskan, menolak rayuan:

(1) Kejadian penting untuk mempertimbangkan adalah apa sebenarnya berlaku semasa kes pengurusan pada 16 Februari 2011 di hadapan timbalan pendaftar. Ia adalah alasan biasa bahawa En Tommy Thomas tidak senang pada tarikh tersebut dan tidak dapat dihubungi. Adalah tidak mungkin bahawa En Ganesan telah bersetuju kepada tarikh tersebut sepenuhnya apabila pada mulanya dia telah memberitahu bahawa tarikh 18 Februari 2011 tidak sesuai kepada En Tommy Thomas dan telah meminta tarikh yang lain. Adalah dikesali bahawa timbalan pendaftar tidak merekodkan minit pengurusan kes secara tepat dan ia adalah untuk membayangkan bahawa En Tommy Thomas tidak dapat dihubungi semasa penangguhan pendek tersebut dan oleh itu En Ganesan tidak dapat memperolehi apa-apa arahan daripada En Tommy Thomas (lihat perenggan 21 & 24).

(2) Pendengaran didengar tanpa faedah penghujahan keseluruhan daripada

En Tommy Thomas mengambil kira yang ia berkaitan tafsiran Perlembagaan Selangor dalam konteks kuasa Speaker Dewan Undangan dalam mengisytiharkan kekosongan kerusi negeri dan Perlembagaan Persekutuan. Tidak perlu dikatakan ianya lebih kepada perkara kepentingan awam. Tiada prejudis kepada kedua-dua pihak jika kausa tindakan dilaksanakan. Kehadiran peguam dengan hormatnya tidak mengesahkan pendengaran. Sebenarnya daripada permulaan pendengaran peguam tersebut telah memberitahu yang dia tidak mendapat arahan untuk meneruskan dengan pendengaran dan bukan dalam kedudukan untuk membuat apa-apa hujahan (lihat perenggan 27).

(3) Kebiasaannya, kesimpulan sedemikian akan memerlukan mahkamah ini untuk mengetepikan perintah-perintah mahkamah yang dibuat pada 18 Februari 2011 dan untuk meremit perkara untuk perbicaraan semula atas meritnya. Walau bagaimanapun, memandangkan isu yang berbangkit dalam perkara ini adalah ditentukan oleh Mahkamah Tinggi melalui afidavit-afidavit dan atas matriks fakta yang tidak dipertikaikan, mahkamah ini berhak untuk meneruskan untuk mempertimbangkan merit rayuan tersebut. Rayuan-rayuan seperti kes ini didengar melalui pendengaran semula penghujahan dan oleh itu tidak akan terdapat apa-apa prejudis disebabkan kepada pihak-pihak (lihat perenggan 28).]

Notes

For a case on appeal against adjournment, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 255.

Cases referred to

Federal Hotel Sdn Bhd v National Union Of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175, FC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)

YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24; [2009] 4 CLJ 253, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(1)
Federal Constitution art 72
Laws of the Constitution of Selangor arts 69, 70(1), 75

Appeal from: Originating Summons No 24–197 of 2011 (High Court, Shah Alam)

Ganesan Nethi (Rahayu Mumazaini with him) (Tommy Thomas) for the appellant.
Firoz Hussein bin Ahmad Jamaluddin (Cheng Mai, Muhammad Asmirul Asraf bin Fadli and Nazeera Hanifa with him) (Hafarizam Wan & Aisha Mubarak) for the first respondent.
Munahyza bt Mustafa (Andi Razalijaya bin A Dadi with her) (Attorney General's Chambers) for the second respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us. One is Appeal No B-01–199 of 2011 ('merit appeal') which is an appeal against the decision of Shah Alam High Court given on 18 February 2011 allowing encl 1, the terms of which are as follows:

(a) Allowed the Originating Summons dated 24.1.2011 ('OS') with costs and granted the following declarations to the 1st Respondent:–

(i) that the 1 Respondent is still the State Legislative Assemblyman for N46 Port Klang;

(ii) that there is no vacancy of the said seat of the State Legislative Assembly for Constituency known as N46 Port Klang;

(iii) that the decision of the Appellant declaring the N46 Port Klang seat as vacant was ultra vires Article 69 of the Selangor State Constitution, and/or was wrongful and/or null and void; and

(b) Dismissed the Appellant's Summons in Chambers dated 10.2.2011 which was the Appellant's application to strike out the OS on the basis that the matter was not justiciable and that he is conferred immunity under Article 72 of the Federal Constitution and Paragraphs 2 and 3 to the Schedule to Article 77 of the Selangor State Constitution 1959 .

[2] The other appeal is Appeal No B-01–363 of 2011 ('setting aside appeal') which is an appeal against the decision of Shah Alam High Court given on 4 May 2011 dismissing with costs the appellant's application to set aside the order made in the merit appeal dated 18 February 2011 on the ground, inter alia, that it was a judgment in default.

[3] We heard both the appeals together and reserved judgment to a date to be fixed. We have since considered the respective submissions and now give our decision and grounds for the same.

[4] In view of the nature of the setting aside appeal, we find it fit that we should deal with that appeal first.

SETTING ASIDE APPEAL

Background facts

[5] To recap, the appellant had filed an application to set aside the judgment of 18 February 2011 on the ground that the same was a judgment in default. The circumstances in which the appellant premised this application were these.

[6] The matter was originally fixed for hearing on 17 February 2011 for encl 1 ('originating summons') and encl 8 ('striking out application').

[7] The appellant's solicitors wrote to the court on 11 February 2011 seeking an adjournment of the hearing on 17 February 2011 on the basis that the appellant's counsel, Mr Tommy Thomas was engaged in a trial in Johor Bahru.

[8] Case management of the originating summons was then fixed on 16 February 2011 for the purpose of fixing a hearing date. On that day, after consultation with all parties, the court fixed the matter for hearing on 18 February 2011 at 3pm with directions to counsel to file their outline written submissions and bring them to court on the day of hearing.

[9] No written request for adjournment was made by counsel for the appellant on the 18 February 2011. Nor did they inform the first respondent's solicitors that they intend to apply for an adjournment on 18 February 2011 on the ground that Mr Tommy Thomas would still be in Johor Bahru High Court.

[10] At the hearing on 18 February 2011 at 3pm, Mr Tommy Thomas's junior counsel appeared and requested for an adjournment of the hearing on the ground that Mr Tommy Thomas was still conducting a trial in Johor Bahru High Court.

[11] After seeking all the parties' views on this application, particularly with regard to the manner in which the hearing date had been fixed during case management on the 16 February 2011 in the presence of all parties, the learned judge refused to grant an adjournment and proceeded with the hearing of the matter.

[12] The junior counsel did not make any submissions and also did not provide the court with any outline submissions. Submissions by respective counsel for the first and second respondent were made and they also relied on their respective outline submissions.

[13] After hearing parties, the court on the same day dismissed the appellant's encl 8 (striking out application) and allowed the first respondent's prayers (a), (b) and (c) of the encl 1 (originating summons) with costs of RM40,000.

[14] The appellant filed the application in the High Court to set aside the purported 'default' judgement of 18 February 2011 which was dismissed with costs.

Our decision and reasons

[15] In respect of this appeal there is only one issue and that is whether the learned judge was correct in not allowing an adjournment requested by junior counsel at the hearing of encl 1.

[16] Before us as in the High Court, learned counsel for the appellant submits that the judgment obtained on 18 February 2011 was a judgment in default as opposed to a judgment on merits given after hearing submissions from counsel.

[17] If it was the latter, the law is clear and it is as stated in the Federal Court in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673:

> [44] We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is *functus officio*. The matter as decided vide encl 6 is thus res judicata and cannot be re-litigated. It needs to be emphasised that the order made under encl 6 was appealed and affirmed right up to the Federal Court. *It cannot now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did.* This passage from Tenaga Bhd explains the rationale.
>
> There was no merit in the appellant's argument that the second application to set aside the default judgment was justified because it was based upon a different ground from that relied upon in the first application. The doctrine of res judicata in its wider sense was applicable in the present case. It was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would amount to presenting one's case in instalment which the law does not permit.
>
> In our judgment too, the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of res judicata. The judicial process rests on the twin pillars of certainty and finality. A final order or a

judgment must therefore be vigorously protected by this doctrine, a position taken by the common law courts ever since *Henderson [1843]*.

[18] Learned counsel for the Appellant concedes the just stated position, hence his insistence that the circumstances in which the judgment dated 18 February 2011 was given render it a default judgment which would allow the appellant to make an application to set aside as he had done in this case.

[19] The learned judge in her grounds examined the circumstances and this is what she said:

> Be that as it may, I must make it clear that I already agreed to the postponement requested by counsel for the first defendant and instructed the registrar to fix a date acceptable to all parties. I was ready to hear the case on the 18 February 2011 after being told by the registrar that all parties had agreed that it be heard on that day. Even before I proceeded on that very day, I listened to the explanation and arguments by all parties as to the fixing of the date and was satisfied that the date had been acceptable by everybody before the registrar. There was no issue that the first defendant's counsel was being compelled to accept the date then. There was no letter from the first defendant's counsel to that effect. I noted that Cik Nur Ashikin was not present before the registrar and Encik Ganesan was not before me on the 18th.
>
> When Cik Nur Ashikin asked to withdraw from the proceedings, I asked whether the firm of Tommy Thomas is withdrawing and she said that there was no application to discharge. Cik Nur Ashikin then remained throughout the proceedings and I asked her every time the Plaintiff's counsel completed his oral submission whether she wished to say anything each time her answer was she had no instruction ...
>
> I must stress in this instance, the first defendant was represented by the firm of Tommy Thomas. Although the senior counsel of choice was not there, the junior counsel was present throughout the proceedings. She was given every opportunity to reply and to submit. In fact the registrar had already informed the parties to prepare for submissions on that day but the first defendant's counsel failed to do so. So the first defendant and his counsel have only themselves to blame for the consequence.

[20] Learned counsel for the appellant premised his submission on the basic right of every litigant to be heard which he alleges that the appellant was not given. It is also submitted that the appellant was also denied a lawyer of his choice and no submission on behalf of the appellant was made to the learned judge on 18 February 2011.

[21] Having heard submissions and perused the various affidavits, we are of the view that the crucial event for us to consider is what actually happened during case management on 16 February 2011 before the deputy registrar.

[22] According to Mr Ganesan a/l Nethiganantarajah this is what happened:

> 19. The Deputy Registrar then informed me that she had to fix the hearing on either Friday, 18-2-2011 or Monday, 21-2-2011. As Hafarizam was engaged in a hearing at the Federal Court on Monday, 21-2-2011, the only remaining date was Friday, 18-2-2011. The Deputy Registrar then directed that the case management be stood down to enable me to contact Mr Thomas on the telephone to check with him on having the Hearing at 3.00 pm on Friday, 18-2-2011.
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> 20. I then tried to telephone Mr Thomas, but was unsuccessful.
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> 21. Upon attending again before the Deputy Registrar, I informed her that my attempts to contact Mr Thomas had proved unsuccessful.
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> 22. The Deputy Registrar informed parties that she had to fix the Hearing on Friday, 18-2-2100 at 3.00 pm. The Deputy Registrar also informed me that no further adjournments of the Hearing would be allowed.
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> 23. I informed the Deputy Registrar that if she insisted on fixing the Hearing at 3.00 pm on Friday, 18-2-2011, I could only record this date and inform Mr Thomas accordingly, as I was not involved in this matter in any capacity, and was only attending Case Management that day as Mr Thomas was engaged in Johor Bahru Trial. I also informed the Deputy Registrar that as I was not one of the counsel with conduct of this matter, I could not agree to 'no further adjournments'.
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> 24. The Deputy Registrar then fixed the Hearing at 3.00 pm on 18-2-2011 before Justice Dato' Zaleha binti Yusof at Shah Alam High Court. I duly recorded this date, and the Case Management then ended.

[23] Mr Mohd Hafarizam bin Harun counsel for the first respondent recollect the event as follows:

> 6. I was present during case management on 16-2-2011 before the Deputy Registrar. Paragraphs 7-9 of the affidavit 2 are admitted. In addition to the averment in paragraph 14 of affidavit 2, the Deputy Registrar also directed parties to file outline written submissions and bring it on the day fixed for hearing.
>
> 7. In reply to paragraphs 21, 22, and 23 of affidavit 2, I aver that after the stand down, Mr Ganesan a/l Nethiganantarajah informed the Court that he had been unable to contact Mr Thomas and therefore, will leave it to the Court and take whatever date the Court fixes and will inform Mr Thomas accordingly.
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> 8. Paragraph 24 of the affidavit 2 is admitted. Now produced and shown to me is a copy of the Court's minutes of the case management on 16-2-2011, marked as exhibit 'MHH-1'.
>
> 9. Therefore, on 18-2-2011 hearing date was fixed with the consent of all parties and it is not open now for Ganesan to contend otherwise. The 1st Defendant's solicitors did not at any time after the case management on the morning of 16-2-2011 or to inform the Court that their counsel intends to seek an adjournment on the hearing of 18-2-2011 itself.

[24] The crucial question which one needs to ask is 'was the date of 18th February 2011 fixed with the consent of counsel'. It is common ground that Mr Tommy Thomas was not free on that date. It is common ground that Mr Ganesan could not contact Mr Tommy Thomas during the short adjournment. Under such circumstance, can we say that the date was agreed by counsel? It is our considered view that it is unlikely that Mr Ganesan had consented to the date unreservedly when in the first place he had informed that the date of 18 February 2011 was not suitable to Mr Tommy Thomas and had asked for another date. It is unfortunate that the deputy registrar had not recorded the minutes of the case management accurately and that is to reflect that Mr Tommy Thomas could not be contacted during that short adjournment and as such Mr Ganesan was not able to obtain any instruction from Mr Tommy Thomas.

[25] Had the learned judge been fully apprised of that vital fact, she may have a taken a different view. The right of litigant to engage counsel of his choice should not be taken lightly. The Federal Court in the case of *Federal Hotel Sdn Bhd v National Union Of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 per Abdoolcader J noted that the refusal of the Industrial Court to allow the litigant's choice of counsel 'was a gross violation of the fundamental principles of natural justice'. However such counsel of choice must ensure that he does not abuse his right by not attending a hearing date when he had agreed to it.

[26] We are fully aware that nowadays application for adjournment by litigants cannot be taken for granted and it will only be granted only in exceptional circumstances. That said, we must not lose sight of the paramount duty of the courts and that is to ensure that justice is done in all cases.

[27] In the present case, the hearing was heard without the benefit of full submission from Mr Tommy Thomas bearing in mind that it related to an interpretation of the Constitution of the Selangor in the context of the power of the Speaker of the Legislative Assembly in declaring a state seat vacant and the Federal Constitution. Needless to say it was very much a public interest matter. Under such circumstances, we ask the question whether justice would not have been better served if the learned judge after hearing counsel for the first respondent were to at least adjourn to another short date so that Mr Tommy Thomas be given a chance to reply what had been submitted by respective counsel for the first respondent. We see no prejudice to either party if that course of action was taken. The presence of junior counsel with respect does not legitimise the hearing. In fact from the commencement of the hearing the junior counsel had informed that she had no instruction to proceed with the hearing and not in any position to make any submission.

Conclusion

[28] Ordinarily, a conclusion as aforesaid would entail this court to set aside the orders of the court made on 18 February 2011 and to remit the matter for retrial on its merits. However, as the issues that arose in this matter was determined by the High Court by way of affidavits and on undisputed factual matrix, this court was entitled to proceed to consider the merits of the appeal. Appeals such as this are disposed by way of a rehearing of the arguments and accordingly there will not be any prejudice caused thereby to the parties. In fact s 69(1) of the Courts of Judicature Act 1964 (revised — 1972) states as follows:

> (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

With that we now consider the merit appeal.

MERIT APPEAL

Background facts

[29] The appellant was the Speaker of the 12th State Legislative Assembly of Selangor while the respondent was the assemblyman for N46 Port Klang constituency.

[30] The appellant is empowered under art 69 of the Selangor State Constitution vested to declare assembly seats vacant if the relevant state assemblyman is found to be absent for a period of six months.

[31] The appellant found that the respondent had been absent for six months from sittings of the State Assembly and on 19 February 2011 declared the seat of the respondent vacant as allowed under art 69 of the Selangor State Constitution.

[32] The factual matrix upon which the appellant exercised his power is undisputed and they were as set out in the submissions of respective counsel and for convenience we adopt the same with some relevant amendments.

[33] The first respondent attended the Selangor State Legislative Assembly sittings on 12 July 2010 and 15 July 2010. The first respondent did not attend the sittings on 8–16 November 2010 as he was seeking traditional medical treatment. There were no sittings between 15 July 2010 and 8 November 2010.

The first respondent informed the appellant via a letter that he was unable to attend the sittings from 8–16 November 2010 as he was seeking traditional medical treatment.

[34] The appellant, in a letter dated 21 December 2010, rejected the first respondent's reasons for absence and decided that the respondent's absence was without leave.

[35] On or around 19 January 2011, the appellant through press statements and the mass media, declared the first respondent's seat of Selangor State Legislative Assembly N46 Port Klang vacant, purportedly pursuant to art 69 of the Selangor State Constitution.

[36] The first respondent came to know of the appellant's decision through press reports.

[37] The appellant then on 21 January 2011 notified the second respondent, the Election Commission, that the N46 Port Klang seat was vacant. Again the first respondent came to know of this fact through press reports. That letter dated 21 January 2011 to the second respondent came to the first respondent's sight when reading the affidavit in reply of the second respondent affirmed on 7 February 2011.

[38] Subsequently, the first respondent first saw a copy of the purported 'Declaration' by the speaker when reading the affidavit in reply of the second respondent affirmed on the 7 February 2011.

[39] The decision of the appellant was not made or pronounced during the proceedings of the Selangor State Legislative Assembly.

Our decision and reasons

[40] In respect of this appeal we are in no doubt that there are only two issues which are as follows:

(1) whether the appellant's act in declaring the seat for the N46 Port Klang constituency is immune from legal action?; and

(2) if the answer to the Issue 1 is in the negative, was the aforesaid action of the appellant correct in law?.

[41] For Issue 1, it concerns the interpretation of art 72 of the Federal Constitution which reads as follows:

(1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court.

(2) No person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in proceedings of the Legislative Assembly of any State or of any committee thereof.

(3) No person shall be liable to any proceedings in any court in respect of anything published by or under the authority of the Legislative Assembly of any State.

(4) Clause (2) shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948 as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970.

(5) Notwithstanding Clause (4), no person shall be liable to any proceedings in any court in respect of anything said by him of the Ruler of any State when taking part in any proceedings of the Legislative Assembly of any State or any committee thereof except where he advocates the abolition of the Ruler's position as the constitutional Ruler of that State.

[42] Learned counsel for the appellant also relies on art 75 of the Selangor State Constitution which reads as follows:

Procedure of legislative Assembly:

75(1) Subject to the provisions of the Federal Constitution and this Constitution, the Legislative Assembly shall regulate its own procedure and may from time to time make, amend and revoke Standing Rules and Orders for the regulation and orderly conduct of its proceedings and conduct of business.

[43] Premised on the above articles, learned counsel for the appellant submits that the appellant's action in declaring the seat of N46 Port Klang constituency vacant is not subject to judicial scrutiny. With respect, we are unable to agree and our reasons are these. It should be noted that in both articles they provide that only decisions made during proceedings in the State Assembly are not subject to judicial scrutiny. Can we then say that the decision of the appellant in making the declaration of vacancy a decision made during proceedings in the business of the State Assembly. We answer in the negative. The considerations in which the appellant used to make his decision were not matters connected with the business of the proceedings in the State Assembly. The purported absence of the first respondent in sittings of the State Assembly is something outside the walls of the State Assembly. Further, we agree with the learned judge that since the announcement was made on 19 January 2011 in a press conference, it did not form part of the proceedings of the State Assembly.

[44] In any event whether immunity can be extended to the Speaker of a State Assembly is settled by the Federal Court in the case of *YAB Dato' Dr*

Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24; [2009] 4 CLJ 253 where the Federal Court held that in a country where the doctrine of supremacy of Parliament does not apply, the powers of Parliament and State Legislature are subject to province of the Federal Constitution and what is within its power or not, when there is a challenge to its decision, it is for the courts to decide. With that we move on to Issue 2.

[45] Learned counsel for the appellant submits that the appellant's interpretation of art 69 of the Selangor State Constitution is correct. Article 69 reads as follows:

> If a member of the Legislative Assembly is without leave of the Speaker absent from every sitting thereof for a period of six months his seat shall be declared vacant by the Speaker.

[46] The crucial issue is whether the first respondent had been absent from every sitting for a period of six months. Of relevance to this issue is art 70(1) of the Selangor State Constitution which reads as follows:

> His Highness shall from time to time by Proclamation published in the Gazette summon the Legislative Assembly and shall not allow six months to elapse between the last sitting in one session and the date appointed for its first sitting in the next session.

[47] The salient facts here to recap are as follows. The first sitting of the State Assembly for 2010 was from 12–14 April 2010. In respect of the second sitting the first respondent was absent on 13–14 July 2010 but for medical reasons. He was however present on the 15 July 2010. From 15 July–8 November 2010 there was no sitting. The third sitting commenced from 8–12 November and 15 November 2010 which the first respondent was absent. The appellant then calculated the six months absence from 16 July 2010–16 January 2011 and premised on that the appellant concluded that the first respondent had been absent for a period of six months which permitted him to exercise the power provided for in art 69 of the Selangor State Constitution to declare the seat vacant which he did on 19 January 2011.

[48] The learned judge rejected the aforesaid submission in the following manner:

> 17. Hence, it is my considered opinion that the court must be reasonable and practical in interpreting the said provision of art 69 of the SC. I therefore feel every sitting must refer to the first time he is absent in the sitting and there must be a sitting of the State Assembly. For the year of 2010, the duration of the meeting of the State Assembly are as follows:
>
> First meeting — 12–14 April 2010

Second meeting — 12–15 July 2010

Third meeting — 8–12 and 15 November 2010.

18. The Plaintiff was absent at sittings on 13–14 of July 2010. He produced a medical certificate for his absence. However he was present on 15 July 2010.

19. From the schedule of the meeting it is clear that there was no sitting from 16 July 2010. The plaintiff was absent for the whole duration of the third meeting. The first defendant had calculated the plaintiff's absence to begin from 16 July 2010 and therefore the period of six months completed on 16 January 2011. According to the declaration shown in exh TCK-4, his seat was declared vacant effective from 16 January 2011. As I have stated earlier, there must be a sitting of the State Assembly for a person to be absent from it. As had been decided in *Sivakumar*'s case 'sitting' and 'proceeding' are the same. There is no proceeding if there is no sitting. So how could we calculate the plaintiff's absence 'from every sitting' to start from the period when there is no sitting? Common sense would tell that 'absence from every sitting' must begin from the period where there is a sitting.

[49] Article 69, is silent as to when the six month period is supposed to commence. Be that as it may, we are constrained to give art 69 an interpretation which does not completely ignore the clear intention of giving the power to the speaker to declare a seat vacant and leads to absurdity.

[50] Approaching the task in those manners, we are attracted by the contention of the first respondent's counsel which is that the calculation of the six month period is to commence from the first day of absence without leave and not from the last sitting which a state assemblyman was present. With such interpretation the periods in which there are no sittings would not be taken into account in the calculation of the six month period. Our view is fortified with the existence of which art 70(1) of the Selangor State Constitution provides that there cannot be more than a six month period between sittings of the State Assembly. Accordingly the commencement of the six period should be either 8 November 2010 (the first day of the sitting when first respondent was absent without leave of absence) or 16 November 2010 (the last day of the sittings for November 2010).

[51] Accordingly we affirm the decision of the learned judge and dismiss the appeal with no order as to costs. We also order the deposit to be refunded.

Appeal dismissed.

Reported by Afiq Mohamad Noor